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Office Of The Attorney General Guidelines For The Special Commission On The Health Care Payment System.

Introduction

The Massachusetts General Court enacted Chapter 305 of the Acts of 2008 ("Chapter 305") in order to contain health care costs while improving the quality of health care for Massachusetts residents. Section 44 of Chapter 305 established a Special Commission comprised of representatives of both public bodies and private health care entities ("Special Commission") and directed it to investigate reforming and restructuring the health care payment system.

These guidelines are designed to provide a framework for collaborative discussions among members of the Special Commission, and with those they may consult, concerning health care payment measures, current payment incentives and other payment terms that otherwise could raise antitrust concerns when such discussions occur among competing market participants. At the same time, these guidelines are not intended to encourage discussions or legitimize anticompetitive agreements among competing market participants concerning actual prices or payment terms that are not reasonably related to the Special Commission's investigation of health care payment reform pursuant the legislative mandate.

Guidelines

Pursuant to section 44(f) of Chapter 305 the Office of the Attorney General issues the following Guidelines for the Special Commission. Individuals or entities are not subject to antitrust liability for actions taken in compliance with these Guidelines. However, nothing in these Guidelines authorizes or immunizes price fixing or other per se unlawful collusive behavior among otherwise competing health care entities.

Members of the Special Commission ("members") should adhere to the following guidelines in conducting the work of the Special Commission:

1. Members may obtain and use non-price specific information regarding payment methodologies, purchasing strategies, payment-related incentives and related matters. For example, members may consult with and obtain non-price specific information from health care economists, other experts, health care providers,



health care payers, or other individuals or organizations with information relevant to the work of the Special Commission.

2. Members should not obtain, use or discuss non-public information where the information includes specific price or cost data from any individual health care provider, health care payer or other health care entity. The Special Commission may only obtain aggregated price or cost data consistent with the procedure described in Guideline 8 below.
3. Members may discuss, collaborate and agree upon on a proposed uniform set of performance measures, if appropriate, but should avoid any agreement on a specific payment amount related to such measures.
4. The Special Commission should avoid specific recommendations concerning the price to be charged for any specific service or product.
5. Apart from contractual negotiations in the ordinary course of business, members representing non-public sector entities should not engage in any private or off the record discussions with each other concerning prices or price-related terms.
6. The Special Commission should prepare minutes of its meetings which accurately reflect the topics of discussion, describe any actions taken by the Special Commission and state the reasons for those actions.
7. Members should avoid discussions with representatives of any non-public sector entity concerning the following matters:
 - a) Information concerning such entity's costs, margins, pricing formulas, market share, or other commercial information of a non-public nature; and
 - b) Current or future prices with respect to any specific health care product or service.

If the Commissioner or her representative is aware of any such discussions, she should terminate the discussion until the members of the Special Commission can review the matter with the Attorney General.

8. If necessary to the work of the Special Commission, specific price and cost information from competing health care entities may only be used in aggregated form consistent with the antitrust safety zone described by the Federal antitrust enforcement agencies. *See The Department of Justice and Federal Trade Commission Statement of Antitrust Enforcement Policy in Health Care, Statement 6: Enforcement Policy On Provider Participation in Exchanges of Price and Cost Information* (copy attached hereto). Specifically, the Special Commission may obtain and use aggregated price or cost data from individual health care entities if the following conditions are met:

- a) The specific price or cost information is obtained and managed by a third party, such as a consultant or governmental agency;
 - b) The information provided is based on data more than three months old;
and
 - c) There are at least five entities providing data upon which each disseminated statistic is based, no individual entity's data represents more than 25% on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular entity.
9. Nothing in these Guidelines authorizes or immunizes price fixing or other per se unlawful collusive behavior among otherwise competing non-public health care provider, payers or other entities.
10. The Attorney General shall, in consultation with the Co-Chairs of the Special Commission, appoint a Special Assistant Attorney General and/or Assistant Attorney General, to attend meetings of the Special Commission and to ensure compliance with these Guidelines.